No.

Supreme Court of the United States

No.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING WRIT	2
I. The Courts below erred in dismissing the complaint	2
II. In ruling that the complaint must set forth allegations showing "Public Injury" the lower courts have departed from the accepted tradition and are in conflict with the General Rule that a private party need only allege violations of the Anti-Trust Laws and injury thereby	3
CONCLUSION	6

CITATIONS

Barth Co. v. *Mitchell, etc.*, 1 Cir., 57 F. 2d 96	4
City of Atlanta v. *Chattanooga, etc.*, 6 Cir., 127 F. 2d 23, 203 U.S. 390	5
Fedderson, etc. v. *Ward*, 10 Cir., 180 F. 2d 519	3
Gardella v. *Chandler*, 2 Cir., 172 F 2d 402	4
Hart v. *B. F. Keith, etc.*, 262 U.S. 271, 274	5
Monarch, etc., v. *American, et al.* (D.C. Ky.), 165 Fed. 774, 777	4
National, etc., v. *National Auto, etc.*, 91 U.S. App. D.C. 313, 200 Fed. 2d 339, 360	5
Radovich v. *National Football, etc.* (1957) 352 U.S. 445, 453	5
Roseland v. *Phister*, 7 Cir., 125 F. 2d 417	5
Wheeler Steuzel Co. v. *Nat'l Window, etc.*, 3 Cir., 152 Fed. 874	4

No.

IN THE

Supreme Court of the United States

FEBRUARY TERM, 1961

No.

ADOLPH HOHENSEE, *Petitioner*,

v.

MARILYN FERGUSON, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review a decision of the United States Court for the Third Circuit holding that petitioner's complaint was properly dismissed by the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is appended at page 28 of the appendix.

The opinion of the District Court dismissing the complaint is appended at page 21 of the appendix.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 22, 1960, and is included in the appendix at page 25; the time for filing petition for Writ of Certiorari

in this Court was first extended to and including January 20, 1961, by an order of the Court, and was thereafter by order of this Court dated January 19, 1961, to and including February 23, 1961.

Jurisdiction is evoked here under 28 U.S.C. 1254(1). Jurisdiction below was based upon Sections 1, 2 and 15 of 28 U.S.C., the "Sherman Act" as amended.

QUESTIONS PRESENTED

1. Did the Court below err in dismissing the complaint of petitioner?

2. Whether a complaint for injury by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the Anti-Trust Laws and injury thereby?

STATUTES INVOLVED

The Statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. 26.

STATEMENT

Petitioner's complaint was filed on May 17, 1957. The respondents filed their respective motions to dismiss for improper venue on July 5, 6, 9 and 10, 1957. Thereafter the District Court entered its Judgment dismissing the complaint on November 12, 1959. The dismissal of the District Court was based on the rationale that the complaint failed to state a cause of action upon which relief can be granted.

Thereupon an appeal was prosecuted to the Court of Appeals for the Third Circuit. The Court of Appeals affirmed the Judgment of the District Court on grounds not employed by the latter Court in its opinion or Judgment.

REASONS FOR GRANTING THE WRIT

I

The Court Below erred in dismissing the Complaint.

The Court of its own motion dismissed the Complaint. The record shows that the respondents sought in the District Court to have the complaint dismissed on the ground that venue was laid in the wrong District under 15 U.S.C. Section 15 because service was not effected on the respondents within the Middle District of Pennsylvania. The District Court in its opinion on this point said: "Normally this might present the problem of whether to dsmiss as to Ferguson, Zehner, Cloonan and Allegheny County Medical Association because of improper venue or to transfer to the Western District of Pennsylvania. However, fully determinative of any such questions, for the reasons stated by this Court in *Hohensee* v. *Goon Squad et al.*, (March 19, 1959) 171 F. Supp. 562, the complaint must, in any event, be dismissed as to all parties defendant on the ground that plaintiff has failed to state a claim on which relief can be granted".

The Third Circuit did not affirm the Judgment of the District Court on the ground that the complaint failed to state a cause of action. On the contrary the Third Circuit decided the case on the question of Venue, and injected the issue of the exercise of its discretion in refusing to transfer the case to the Western District.

There was no unanimity of rulings of the Court below on the issues adduced by the pleadings.

II

In ruling that the Complaint must set forth allegations showing "public injury", the Lower Courts have departed from the accepted tradition and are in conflict with the general rule that a private party need only allege violations of the Anti-Trust Laws and injury thereby.

It must be conceded that prior to 1950, and the decision of the 10th Circuit in the case of *Federson Motors, Inc.*, 180 F. 2d 519, a review of a motion to dismiss, once it was established that the defendants were not exempt from the

Anti-Trust Laws, and that the allegations of interstate commerce were sufficient, the Court would then determine whether or not the complaint alleged violation of the Anti-Trust Laws.

Admittedly, this is all that Section 4 of the Clayton Act says it should do: "that any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws * * *". The *Federson* case, however, established an additional requisite to the effect that the complaint must convince the Court of an inherent injury to the Public.

But the great weight of authority since 1890 has held, that the only requirements for a private person under this Section to state a cause of action are: (1) to allege violations and (2) to allege resulting injury.

As early as 1907 the Third Circuit, contrary to its present holding, stated in the case of *Wheeler Stenzel Co.* v. *Nat'l Window Glass Jobbers Ass'n* 3 Cir., 152 Fed. 874, that "it is manifestly the correct understanding of the Seventh Section of the Act that where a man is harmed in his business or property by a violation of the Act, he has suffered a legal injury and is entitled to his action therefor".

And the First Circuit in *Albert Peck Barth Co.* v. *Mitchell Wodbury Corp.*, 57 F. 2d 96, in 1932, stated: "to constitute an offense under Section 1 of the Sherman Act, it is not necessary, if a conspiracy is proved, the purpose and intent of which was to eliminate by unfair means a competitor in interstate commerce, to show the public was affected and to what extent".

In *Monarch Tobacco Works Co.* v. *American Tobacco Co.*, the Circuit Court in Kentucky stated in 1908, 165 Fed. 774, 777, that: "All that is necessary to support the action is that business or property of the complainant shall have been in some way injured by reason of the illegal scheme".

And the Second Circuit in *Gardella* v. *Chandler*, 172 F.

2d 402, held in 1949, that a baseball player was entitled to a trial by jury under the Sherman Act when the baseball league prevented the plaintiff from obtaining employment in its ranks after a flight to Mexico.

Here, the petitioner, who was engaged in the shipment in interstate commerce of his products and lecturing as to the merit and efficiency of these products, was prevented from continuing his efforts in these respects by the illegal conspiracy of these respondents.

The Sixth Circuit held in the case of *City of Atlanta* v. *Chattanooga Pipe and Foundry*, 1906, 127 Fed. 23, 27, affirmed 203 U.S. 390, that, "Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of law. The Act gives the remedy to a person injured in his business by any other person or corporation by reason of anything forbidden or declared to be unlawful by the Act".

A landmark private action case is that of *Roseland* v. *Phister*, 7 Cir., 1942, 125 F. 2d 417, where it was held that a cause of action was stated by an agent of the defendant-principal, who conspired to deprive him of his job opportunities. The Court of Appeals for the District of Columbia Circuit has held likewise in the case of *National, etc.* v. *National Auto, etc.*, 91 U.S. App. D.C. 313, 200 F. 2d 359, 360.

The foregoing decisions constitute a clear conflict with the instant Judgment of the Third Circuit.

The issues here presented were adjudicated by this Court in the case of *Radovich* v. *Nat'l Football League*, 352 U.S. 445, 453 (1957). In the *Radovich* case this Court said "The test as to sufficiency laid down by Mr. Justice Holmes in *Hart* v. *B. F. Keith, etc.*, 262 U.S. 271, 274 (1923), is whether the claim is wholly frivolous. While the complaint might be more precise in its allegations concerning the purpose and effect of the conspiracy, we are not prepared to say that

nothing can be extracted from this bill that falls under the Act of Congress.

Petitioner's claim need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade, *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has by legislative fiat, determined that such prohibited activities are injurious to the public, and has provided sanctions allowing private enforcement of the Anti-Trust Laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public".

The foregoing decisions clearly demonstrate that there was on basis for the District Court's holding that the complaint failed to state a cause of action.

CONCLUSION

If Section 4 of the Clayton Act and Sections 1 and 2 of the Sherman Act are susceptible to such evisceration, they become a snare for the dissipation of time and money by unwary private litigants. If the Congressional Mandate embodied in said Sections is to retain vitality, this Court's attention is needed. A Writ of Certiorari should accordingly be granted.

James C. Newton
1934 8th Street, N.W.
Washington 1, D. C.
Attorney for Petitioner

APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT

5949
Civil

Jury Demand date: May 17, 1957

PROCEEDINGS

May, 17, 1957, 1—Complaint and demand for jury trial.

2—Summons issued returnable 20 days after service. Copies of complaint, summons and copies handed U. S. Marshal. J.S. 5.

June 25, 1957, Summons returned served 6-20-57, on the American Medical Association by making service on Dr. Francis P. Boland, M.D., Medical Arts Building, 327 N. Washington Avenue, Scranton, Pennsylvania.

June 27, 1957, 3—Duplicate original summons returned served 6-21-57, on Marilyn Ferguson, personally, at her place of business, Sun-Telegraph, Pittsburgh, Pennsylvania. Returned served 6-21-57, on J. Alex Zehner, at his place of business, Sun-Telegraph, Pittsburgh, Pennsylvania. Returned served 6-21-57, on Allegheny County Medical Association, by making service on David Katz, President, 103 Centry Building, Pittsburgh, Pennsylvania. Returned served 6-21-57, on Gilbert Cloonan, personally, at his place of employment, Soldiers and Sailors Memorial Hall, University Place and Fifty Avenue, Pittsburgh, Pa. (MF&E $8.60).

July 5, 1957, 4—Motion to dismiss for improper venue filed on behalf of Board of Managers of Soldiers and Sailors Memorial Hall of Allegheny County and Gilbert Cloonan, and

July 5, 1957, Statement of Service thereof.

July 5, 1957, 5—Appearance of Russell J. O'Malley and William A. Challener, Jr., Esquires, as counsel for Allegheny County Medical Society, one of the Defendants.

July 5, 1957, 6—Motion to dismiss for Improper Venue on behalf of Allegheny County Medical Society.

July 9, 1957, 7—Motions to dismiss Action on behalf of American Medical Association, and Notice that said Motions will be brought on for hearing October 7, 1957, at 11:00 A.M., at Scranton, Pennsylvania, and

July 9, 1957, Statement of service thereon.

July 10, 1957, 8—Motion to dismiss Action on behalf of Marilyn Ferguson, Defendant, and Notice that said Motion will be brought on for hearing October 7, 1957, at 11:00 A.M., at Scranton, Pennsylvania.

July 10, 1957, 9—Motion to dismiss Action on behalf of J. Alex Zehner, Defendant, and Notice that said Motion will be brought on for hearing October 7, 1957, at 11:00 A.M., at Scranton, Pennsylvania.

Sept. 27, 1957, 10—Notice that said Motion (to dismiss for Improper Venue on behalf of Allegheny County Medical Society) will be brought on for hearing on October 7, 1957, at 11 O'clock A.M. at Scranton, Pennsylvania, and Statement of service thereof.

Sept. 27, 1957, 11—Affidavit of Allegheny County Medical Society in Support of Motion, and Statement of service thereof.

Oct. 4, 1957, 12—Proof of service of Motion filed by J. Alex Zehner.

Oct. 4, 1957, 13—Proof of service of Motion filed by Allegheny County Medical Assn.

Oct. 4, 1957, 14—Proof of service of Motion filed by Marilyn Ferguson.

Oct. 7, 1957, 15—Clerk's Minute Sheet—re-hearing on all motions scheduled for this date. (Motions to dismiss). (M)

Sept. 22, 1958, 16—Affidavit of prejudice against Judge John W. Murphy.

Oct. 9, 1959, 17—Copy of letter, dated 9-29-59, from Warden of Medical Center for Federal Prisoners, Springfield, Missouri, to Judge Follmer, stating that Adolph Hohensee was discharged from the Medical Center by minimum expiration of sentence on April 13, 1958.

Oct. 12, 1959, 18—BRIEF—on behalf of Gilbert Cloonan and the Board of managers of Soldiers and Sailors Memorial Hall of Allegheny County in support of Motion to Dismiss.

Oct. 31, 1959, 19—BRIEF—of plaintiff in oppostion to defendants' motion to dismiss, etc.

Nov. 11, 1959, 20—MEMORANDUM—of Hon. Frederick V. Follmer, U.S. District Judge, and

Nov. 11, 1959, ORDER—NOW, to wit, November 11, 1959, in accordance with Memorandum, filed this date, It Is Ordered and Decreed that service of process on American Medical Association be and hereby set aside

It is further Ordered and Decreed that the complaint as to all parties defendant be and the same is hereby dismissed for the reason that fails to state a claim on which relief can be granted. (FVF)

Nov. 11, 1959, COPIES—of Memorandum and Order mailed to Adolph Hohensee, P. O. Box 910, Scranton, Pennsylvania, and to counsel for all the Defendants.

Nov. 11, 1959, J.S. 6.

Dec. 4, 1959, 21—NOTICE OF APPEAL—by plaintiff. Copies of Notice of Appeal mailed to U.S. Court of Appeals and to counsel for defendants.

Dec. 8, 1959, 22—CARD—acknowledging receipt of copy of Plaintiff's Notice of Appeal.

Jan. 5, 1960, 23—RECORD ON APPEAL—mailed to U.S. Court of Appeals. (List of documents)

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed May 17, 1957]

JURY TRIAL DEMANDED

CIVIL ACTION NO. 5949

COMPLAINT

1. This action is brought to recover treble damages under Section 15 of Title 15 of the United States Code.

2. The ground upon which the jurisdiction of this court depends is that this is an action to protect trade and commerce against restraints and monopolies.

3. Plaintiff is, and at all times mentioned in this complaint was, engaged in the business of lecturing and selling products in interstate commerce.

4. Defendant John J. Kane, John M. Walker, Howard B. Stewart, William N. Nicholls, Nathaniel K. Beck, G. H. Rhorer, Gilbert Cloonan, are individuals; Board of Managers of the Allegheny Soldiers and Sailors Memorial Hall of Pittsburgh, Pa. are sued in its official capacity; Allegheny County of Pa. is being sued in its official capacity; Allegheny County Medical Association is an association; American Medical Association is an association; Better Business Bureau of Pittsburgh, Inc., is a corporation; and Affiliated Better Business Bureau, Inc., is a corporation. All of the foregoing defendants are engaged in business in Allegheny County, Pa., as well as defendants Marilyn Ferguson, J. Alex Zehner and Hearst Publications Co., Inc.

5. Defendants, from the year 1944 up to and including the time of the filing of the suit herein, entered into a conspiracy in restraint of trade and commerce between the several states, consisting of:

(a) Cancellation of lecture hall leases without notice or justification

(b) False arrests

(c) Abuse of Process

(d) Unlawful search and seizure

(e) Libel

(f) Slander

(g) Destruction of plaintiff's personal property.

6. As a result of said conspiracy in restraint of trade the plaintiff was directly injured and damaged in his business as follows: (1) Cancellations of leases for series of lectures in various auditoriums without notice or justification, (2) he was made to endure false and illegal arrests, (3) was exposed to abuse of judicial process, (4) was subjected to unlawful and illegal search and seizure, (5) was frequently libeled, (6) was slandered and defamed, (7) suffered destruction of his personal properties, (8) and other wrongs and injuries done to the plaintiff.

WHEREFORE, plaintiff demands:

(1) That a temporary restraining order and preliminary injunction may be issued out of this court upon its order directing defendants, and each of them, and their agents, servants and employees, from in any manner interfering with the plaintiff in his lecturing business, and that after a trial of this cause that said injunction may be made perpetual;

(2) For a judgment of this court against defendants for treble damages in the sum of seven hundred twenty thou-

sand dollars ($720,000.00), with interest from the 17th day of May, 1957, together with costs and disbursements of this action.

/s/ Adolph Hohensee
ADOLPH HOHENSEE,
Plaintiff, pro se
P. O. Box 910,
Scranton, Pa.

MOTION TO DISMISS FOR IMPROPER VENUE

BOARD OF MANAGERS OF SOLDIERS AND SAILORS MEMORIAL HALL OF ALLEGHENY COUNTY and GILBERT CLOONAN, named as defendants in the above entitled action, appear specially before your Honorable Court, by their counsel, Nathaniel K. Beck, County Solicitor of County of Allegheny, Maurice Louik, First Assistant County Solicitor, and Philip Baskin and Arthur L. McLaughlin, III, Assistant County Solicitors, and move the Court to dismiss the action for improper venue, and in support thereof state as follows:

1. Paragraph 1 of plaintiff's Complaint states that this action is brought under Section 15, Title 15, of the United States Code (15 USCA § 15). Said Section 15 requires that an action thereunder be brought in the United States District Court for the district in which the defendant resides or is found, or has an agent.

2. Paragraph 4 of plaintiff's Complaint states that all of the defendants named in the above entitled action are engaged in business in Allegheny County, Pennsylvania.

3. On the face of the Complaint, therefore, it is apparent that this action could not be instituted in the United States District Court for the Middle District of Pennsylvania, Allegheny County being within the district of the United States District Court for the Western District of Pennsylvania.

4. This motion is made without prejudice to defendants'

right to make any other motion or motions, or to file any pleadings in the above entitled action following disposition of the foregoing motion by the Court.

/s/ Nathaniel K. Beck
County Solicitor
/s/ Maurice Louik
First Asst. County Solicitor
/s/ Philip Baskin
Asst. County Solicitor
/s/ Arthur L. McLaughlin, III
Assistant County Solicitor
Attorneys for Board of Managers of Soldiers and Sailors Memorial Hall of Allegheny County and Gilbert Cloonan, Defendants

---

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
United States Penitentiary
Lewisburg, Pennsylvania
August 2, 1957

RE: #24193-NE
HOHENSEE, Adolphus

Mrs. Mildred J. Hohensee
Box 910
Scranton, Pennsylvania

Dear Mrs. Hohensee:

Your husband, Adolphus Hohensee, has requested that we forward you the enclosed Motion To Dismiss For Improper Venue.

Sincerely your
For the Warden
/s/ PAUL D. PETERS
Acting chief, Classification-Parole

Enclosure

MOTION

Defendant J. ALEX ZEHNER moves the court to dismiss the action on the ground that venue is laid in the wrong district, under 15 USCA § 15, because (1) as the return of service shows, the defendant was not found in the Middle District of Pensylvania and (2) as appears by affidavit of J. ALEX ZEHNER, attached hereto as Exhibit A, defendant does not reside in the Middle District of Pennsylvania and has no agent there.

/s/ William S. Moorhead, Jr.
MOORHEAD & KNOX
1732 Oliver Building
Pittsburgh, 22, Pennsylvania

/s/ Russell J. O'Malley
NOGI, O'MALLEY & HARRIS
Miller Building
Scranton 3, Pennsylvania

EXHIBIT A

AFFIDAVIT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 43(e) IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF J. ALEX ZEHNER

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY } ss:

Before me, the undersigned authority, personaly appeared J. ALEX ZEHNER, who being duly sworn deposes and says that he, a defendant named in the above action, resides in Allegheny County, in the Western District of Pennsylvania; that he does not reside in the Middle District of Pennsylvania; that he has no agent for the purpose of service of process or other purpose in the Middle District

of Pennsylvania; that he is not engaged in business in the Middle District of Pennsylvania; and that he has not been served with process of any kind in the Middle District of Pennsylvania.

/s/ J. Alex. Zehner

Sworn and subscribed to before
me this 8th day of July, 1957.
/s/ William H. Eichenberg
Notary Public
[Notarial Seal]
WILLIAM H. EICHENBERG, *Notary Public*
Pittsburgh, Allegheny County, Pa.
My Commission Expires, March 7, 1961

MOTION

Defendant MARILYN FERGUSON moves the court to dismiss the action on the ground that venue is laid in the wrong district under 15 USCA § 15, because (1) as the return of service shows, the defendant was not found in the Middle District of Pennsylvania and (2) as appears by affidavit of MARILYN FERGUSON, attached hereto as Exhibit A, defendant does not reside in the Middle District of Pennsylvania and has no agent there.

/s/ William S. Moorhead, Jr.
MOORHEAD & KNOX
/s/ Russell J. O'Malley
NOGI, O'MALLEY & HARRIS

EXHIBIT A

AFFIDAVIT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 43(e) IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF MARILYN FERGUSON

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss:

Before me, the undersigned authority, personally appeared MARILYN FERGUSON, who being duly sworn deposes and says that she, a defendant named in the above action, resides in Allegheny County, in the Western District of Pennsylvania; that she does not reside in the Middle District of Pennsylvania; that she has no agent for the purpose of service of process or other purpose in the Middle District of Pennsylvania; that she is not engaged in business in the Middle District of Pennsylvania; and that she has not been served with process of any kind in the Middle District of Pennsylvania.

/s/ Marilyn Ferguson

Sworn and subscribed to before
me this 8th day of July, 1957
/s/ Jean M. McLain
Notary Public
[Notarial Seal]
JEAN M. McLAIN, *Notary Public*
Pittsburgh, Allegheny County, Pa.
My Commission Expires March 6, 1961

MOTION TO DISMISS FOR IMPROPER VENUE

ALLEGHENY COUNTY MEDICAL SOCIETY, erroneously referred to in the Complaint as Allegheny County Medical Association, by its counsel, moves the Court to dismiss the action brought against it for the following reasons:

1. This is a civil action brought to recover treble damages under Section 15 of Title 15 of the United States Code. The plaintiff, Adolph Hohensee, gives his address as being P. O. Box 910, Scranton, Pennsylvania.

2. The defendants are all alleged to be engaged in busi-

ness in Allegheny County, Pennsylvania. (Complaint, Paragraph 4).

3. Jurisdiction is not founded solely on diversity of citizenship.

4. A civil action, wherein jurisdiction is not founded solely on diversity of citizenship, may be brought only in the judicial district where all defendants reside, except as otherwise provided in law: June 25, 1948, C. 646, 62 Stat. 935; 28 U.S.C.H. 1391(d).

It appearing that jurisdiction is not founded solely on diversity of citizenship and that the defendants do not reside in this judicial district, but on the contrary all reside in Allegheny County, Pennsylvania, in the Western District of Pennsylvania, Civil Action No. 5949 should be dismissed.

/s/ Russell J. O'Malley
/s/ William A. Challener, Jr.
Counsel for Allegheny County Medical Society

AFFIDAVIT IN SUPPORT OF MOTION UNDER RULE NO. 43(e)

ALLEGHENY COUNTY MEDICAL SOCIETY, one of the defendants above named, avers that it is a corporation organized under the Non Profit Corporation Law of the Commonwealth of Pennsylvania; that its only place of business is located within the County of Allegheny, in the Western District of Pennsylvania; that it has no place of business within the Middle District of the Commonwealth of Pensylvania.

ALLEGHENY COUNTY MEDICAL SOCIETY
By /s/ David Katz, M.D., President

(Official Seal of
the Society)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss:

DAVID KATZ, M.D., being duly sworn according to law, deposes and says that he is President of the Allegheny County Medical Society, one of the above-named defendants; that he is duly authorized to make this affidavit on its behalf; that the facts set forth in the foregoing statement are true and correct.

/s/ David Katz, M.D.

Sworn to and subscribed before me, the undersigned authority this 26th day of September, 1957.

/s/ Eleanor A. Klaus
Notary Public
My commission expires January 29, 1959.

MOTIONS TO DISMISS

The American Medical Association, named as Defendant in the above entitled action, appears specially in this Honorable Court by their counsel, James J. Powell, Esquire, and moves the Court as follows:

1. To dismiss this action or in lieu thereof to quash the Return of the Service of Summons because:

A. Defendant, American Medical Association, is organized as an Illinois corporation under the "General Not for Profit Corporation Act" of Illinois, with its principle offices at 535 North Dearborn Street, Chicago 10, Illinois and was not and is not subject to service of process within the Middle District of Penna.

B. The Defendant, American Medical Association, has not been properly served with process in this action, all of

which more clearly appears in the affidavits of George F. Lull, M.D. and C. Joseph Stetler, Esquire, Secretary and General Manager and Law Department Director, respectively, of the American Medical Association, attached hereto and made a part hereof and marked Exhibit A and Exhibit B respectively.

2. To dismiss this action on the ground that the Court lacks jurisdiction because:

A. Jurisdiction of this Court is invoked solely on the ground that the action is brought under Title 15, Section 15 of the United States Code (15 U.S.C. 15), which section requires that an action be brought in the United States District Court for the district in which the defendant resides, or is found, or has an agent.

B. The Defendant, American Medical Association, has no officer, manager or general agent or an agent authorized by appointment or by law to receive service of process within the Commonwealth of Pennsylvania.

C. The Defendant, American Medical Association, is organized as an Illinois corporation under the "General Not for Profit Corporation Act" of Illinois, with its principal offices at 535 North Dearborn Street, Chicago 10, Illinois, and is an inhabitant thereof.

These motions are made without prejudice to the Defendant, American Medical Association's right to make any other motion or motions, or to file any pleadings in the above entitled matter following disposition of the foregoing Motions by the Court.

SIGNED: POWELL & POWELL
Attorneys-At-Law
308 Mears Building
Scranton, Penna.

BY: /s/ James J. Powell
Attorneys for Defendant

EXHIBIT A

AFFIDAVIT OF GEORGE F. LULL, M.D.

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

GEORGE F. LULL, M.D., being first duly sworn, deposes and says that:

1. He is Secretary and General Manager of the American Medical Association and in this capacity he is employed on a full-time and salaried basis as its chief executive and administrative officer and is directly responsible to its Board of Trustees.

2. The American Medical Association is organized as an Illinois corporation under the "General Not for Profit Corporation Act" of Illinois, with its principal offices at 535 North Dearborn Street, Chicago 10, Illinois. The objects of the corporation as stated in its Articles of Incorporation and Constitution, are to promote the science and art of medicine and the betterment of public health.

3. The American Medical Association serves its members and the medical profession and the public in a manner comparable to that in which the American Bar Association serves its members, the legal profession and the public. In order to promote its corporate purposes as a non-profit organization dedicated to promote the science and art of medicine, the American Medical Association participates in numerous professional, scientific and educational activities.

4. The ordinary business for which the American Medical Association is chartered is carried on at its principal office at Chicago, Illinois, and to a lesser extent at its Washington, D. C. office.

5. The American Medical Association has no office within the State of Pennsylvania nor does it engage in business in the State of Pennsylvania. Furthermore, the Association

has no officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process within the State of Pennsylvania.

6. Dr. Francis P. Boland is one of the more than 150,000 active and associate members of the American Medical Association who reside in the United States and various parts of the world. As a member of the Association his rights and privileges of membership are comparable to those enjoyed by members of the American Bar Association. However, he is neither an officer nor an agent of the American Medical Association, nor is he authorized by appointment or by law to receive service of process.

7. Affiant is informed that Dr. Boland is President of the Lackawanna County Medical Association of Scranton, Pennsylvania, an organization that is separate and independent from the American Medical Association and not authorized in any respect to act as its agent. The relationship of the American Medical Association to the Lackawanna County Medical Association is comparable to the relationship between the American Bar Association and the numerous county and municipal bar associations that exist throughout the United States.

s/ George F. Lull, M.D.

Subscribed and sworn to before
me this 2nd day of July, 1957
s/ William J. McAuliffe, Jr.
Notary Public in and for said Cook
County and State of Illinois
[Notarial Seal]

EXHIBIT B

AFFIDAVIT OF C. JOSEPH STETLER

STATE OF ILLINOIS }
COUNTY OF COOK } ss:

C. JOSEPH STETLER, being first duly sworn, deposes and says that:

1. He is the Director of the Law Department of the American Medical Association and in this capacity he has knowledge of and is in charge of the legal affairs of the Association.

2. The American Medical Association is an Illinois corporation organized and doing business under the "General Not for Profit Corporation Act" of Illinois, with its principal offices at 535 North Dearborn Street, Chicago 10, Illinois. The objects of the corporation as stated in its Articles of Incorporation and Constitution, are to promote the science and art of medicine and the betterment of public health.

3. The American Medical Association has more than 150,000 active and associate members who reside in the United States and various parts of the world. Although, some of its members reside within the State of Pennsylvania, the Association does not maintain an office within the State of Pennsylvania, nor does it maintain agents or employees within said State or any agent authorized by appointment or by law to accept service of process.

4. Dr. Francis P. Boland is a member in good standing of the American Medical Association but as such he is not authorized in any way to act as its agent, nor is he authorized to accept service of process on behalf of the Association.

5. The Lackawanna County Medical Association of which Dr. Boland is President is not chartered in any way by the American Medical Association, nor is it a subsidiary of said Association, but is in fact a separate and independent organization from the American Medical Association.

/s/ C. Joseph Stetler

Subscribed and sworn to before me this 2nd day of July, 1957
/s/ William J. McAuliffe, Jr. Notary Public in and for said County Cook and State Illinois

[Certificate of Service]

MEMORANDUM

The plaintiff in this action[1] is Adolph Hohensee. The defendants are listed as follows: Marilyn Ferguson, J. Alex Zehner; Hearst Publications Co., Inc.; John J. Kane; John M. Walker; Howard B. Stewart; William N. Nicholls; Nathaniel K. Beck; G. H. Rhorer; Gilbert Cloonan; Board of Managers of the Allegheny Soldiers and Sailors Memorial Hall of Pittsburgh, Pa.; Allegheny County of Pa.; Allegheny County Medical Association, its officers and members, John Doe No. 1, John Doe No. 2, John Doe No. 3; American Medical Association; Better Business Bureau of Pittsburgh, Inc., its officers and members; John Doe No. 1, John Doe No. 2; Affiliated Better Business Burea[u], Inc.

The complaint alleges that the action is brought under 15 U.S.C. § 15[2] and in it plaintiff seeks treble damages in the sum of $720,000.00 and injunctive relief. The complaint further alleges "The ground upon which the jurisdiction of this court depends is that this is an action to protect trade and commerce against restraints and monopolies." The complaint also alleges that at all times mentioned plaintiff was engaged in the business of lecturing and selling products in interstate commerce; that the defendants entered into a conspiracy in restraint of trade and commerce

---

[1] This is one of a group of six cases filed in this Court by Adolph Hohensee or Mildred Hohensee, his wife, as follows: No. 5860 on February 25, 1957; No. 5869 on March 4, 1957; No. 5897 on April 10, 1957; No. 5949 on May 17, 1957, No. 5972 on June 24, 1957, and No. 6016 on July 30, 1957. They all stem from, and have a direct relation to, the conviction, sentence and imprisonment in and by this Court of the said Adolph Hohensee of misbranding of drugs in interstate commerce. See *United States of America* v. *El Rancho Adolphus Products, Inc., et al.*, D.C.M.D.Pa., 1956, 140 F. Supp. 645, aff. 243 F. 2d 367.

[2] The referred to section of the Clayton Act, to wit: 15 U.S.C. § 15, reads as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

between the several states, consisting of cancellation of lecture hall leases, false arrests, abuse of process, unlawful search and seizure, libel, slander, and destruction of plaintiff's personal property; that as a result of said conspiracy in restraint of trade plaintiff was directly injured in his business as follows, cancellation of leases for series of lectures in various auditoriums, made to endure false and illegal arrests, exposed to abuse of judicial process, subjected to unlawful search and seizure, frequently libeled, slandered and defamed, suffered destruction of personal property, and other wrongs.

The Marshal's return indicates service of summons and complaint as follows:

Marilyn Ferguson, personally, Pittsburgh, Pennsylvania,

J. Alex Zehner, personally, Pittsburgh, Pennsylvania.

Allegheny County Medical Association by service on its President, David Katz, Pittsburgh, Pennsylvania,

Gilbert Cloonan, personally, Pittsburgh, Pennsylvania,

American Medical Association by service on Dr. Francis P. Boland, Scranton, Pennsylvania.

No service of any sort was made on any of the other defendants.

Defendants Marilyn Ferguson, J. Alex Zehner, Gilbert Cloonan, Allegheny County Medical Association, and American Medical Association have filed motions to dismiss for improper venue.[3]

Plaintiff, Adolph Hohensee, filed an affidavit of bias and prejudice against Honorable John W. Murphy, Chief Judge of this Court, whereupon the case was transferred to the writer of this Memorandum and Order.

In support of their motions to dismiss, defendants Marilyn Ferguson and J. Alex Zehner filed affidavits under

[3] Motion to dismiss was also filed by Board of Managers of Soldiers and Sailors Memorial Hall of Allegheny County. This motion is disregarded for the reason that the Marshal's return does not indicate any service of summons and complaint on this movant.

Rule 43(e) of the Federal Rules of Civil Procedure setting forth that they reside in Allegheny County, Western District of Pennsylvania; that they do not reside in, have no agent for purpose of serving process or other purpose, are not engaged in business and have not been served with process in the Middle District of Pennsylvania.

Defendant Allegheny County Medical Society filed affidavit under Rule 43(e) of the Federal Rules of Civil Procedure setting forth that it is a corporation organized under the Nonprofit Corporation Law of Pennsylvania; that its only place of business is within the County of Allegheny in the Western District; that it has no place of business within the Middle District of Pennsylvania.

Defendant American Medical Association filed affidavit under Rule 43(e) of the Federal Rules of Civil Procedure setting forth, inter alia, that it is organized as an Illinois corporation under the "General Not for Profit Corporation Act" of that State; that it does not engage in business in Pennsylvania, and has no officer or agent authorized to receive process of service in Pennsylvania; that Dr. Francis P. Boland on whom service was made on behalf of said Association, while a member is not an officer or agent authorized to receive service of process.

In the light of the unanswered affidavits in support of the Ferguson and Zelmer motions, it is apparent that there is no venue jurisdiction in this District as to said defendants under the provisions of 15 U.S.C. § 15.

In the light of the unanswered affidavits in support of the Allegheny County Medical Society and the American Medical Association motions, it is apparent that there is no venue jurisdiction in this District under the provisions of 15 U.S.C. § 22.[1] See also *Hohensee* v. *Akron Beacon Journal*

[1] 15 U.S.C. § 22 provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Publishing Company et al., 1959, D.C.N.D.Ohio, 171 F. Supp. 90. And in addition thereto, in so far as American Medical Association is concerned, the service on Dr. Francis P. Boland was an improper service, completely abortive, and must be set aside.

While no affidavit was filed on behalf of Gilbert Cloonan, the record shows that he was served in the Western District of Pennsylvania, and plaintiff has not contended that the said Cloonan was a resident of, or had a place of business, or was found in the Middle District of Pennsylvania.

Normally this might present the problem of whether to dismiss as to Ferguson, Zehner, Cloonan, and Allegheny County Medical Association because of improper venue or to transfer to the Western District of Pennsylvania. However, fully determinative of any such questions, for the reasons stated by this Court in *Hohensee v. Goon Squad et al.*, (March 19, 1959) 171 F. Supp. 562, the complaint must, in any event, be dismissed as to all parties defendant on the ground that plaintiff has failed to state a claim on which relief can be granted.

November 11, 1959

/s/ Frederick V. Follmer
United States District Judge

ORDER

Now, to wit: November 11, 1959, in accordance with Memorandum filed this date, It is Ordered and Decreed that service of process on American Medical Association be and the same is hereby set aside.

It is further Ordered and Decreed that the complaint as to all parties defendant be and the same is hereby dismissed for the reason that it fails to state a claim on which relief can be granted.

s Frederick V. Follmer
United States District Judge

[Filed December 4, 1959]

NOTICE OF APPEAL

Notice is hereby given this 4th day of December, 1959, that the above named plaintiff hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment of this court entered on the 11th day of November, 1959, in favor of defendants, against this plaintiff.

/s/ Adolph Hohensee
ADOLPH HOHENSEE, *Pro Se Plaintiff*
P. O. Box 910,
Scranton, Pa.

ATTORNEYS to be served:

. . . . . .

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Received and Filed February 29, 1960
No. 13,115

ADOLPH HOHENSEE, *Appellant*,
v.
MARILYN FERGUSON, ET AL., *Appellees*.

MOTION TO RATIFY AND VALIDATE COST BOND FILED IN DISTRICT COURT

Comes now the appellant, by his attorney, and moves the court pursuant to Rule 73(e) of the Federal Rules of Civil Procedure, to ratify and validate the cost bond on appeal filed in the court below in the above caption cause on January 15, 1960, and for grounds of this motion, states:

1. That due to inadvertence and excusable neglect the cost bond on appeal was not filed in the District Court until January 15, 1960.

2. That under Rule 73(e) of the Federal Rules of Civil Procedure, this court, alone, is empowered to authorize the ratification or validation of cost bonds on appeal filed out of time in the court below.

3. That appellant hereby urges the court to pass an order ratifying and validating the said cost bond filed in court below as aforesaid.

4. That the affidavit of Simon F. Huber filed heretofore in Docket No. 13,116 is made a part hereof by reference.

5. And for such other and further relief as to the court may seem just and adequate.

JAMES C. NEWTON
1934 Eighth St., N.W.
Washington, D. C.

Counsel for Appellant

NOTICE OF MOTION

TO:
RUSSELL J. O'MALLEY, Esquire,
Miller Building,
Scranton, Pa.

Of Counsel for Appellees

Please take notice that the undersigned will submit the attached to the United States Court of Appeals for the Third Circuit, sitting in the United States Courthouse, Philadelphia, Pennsylvania, without oral argument, on March 7, 1960, or such time as the court will permit.

JAMES C. NEWTON

Counsel for Appellant

February 26, 1960.

MOTION TO EXTEND TIME IN WHICH TO FILE APPELLANT'S BRIEF

Comes now the appellant, by his attorney, and moves the court to extend the time in which to file appellant's brief in the above entitled cause until the 15th day of April, 1960, and for grounds of this motion, says:

1. That until the recent withdrawal of appellee's motions to dismiss the appeal herein, there was no certainty as to the necessity of appellant's brief.

2. That in the light of the pendency and final withdrawal of said preliminary motions appellant now requests the court to extend the time for filing appellant's brief herein until April 15, 1960. Because

3. There are briefs to be filed in Docket Nos. 13,114, 13,115 and 13,116, and that adequate time is needed for preparation and printing.

4. That appellees will in no wise be prejudiced by the requested extension.

5. That the said requested extension is in the interest of justice.

6. And for such other and further relief as to the court may seem just and proper.

JAMES C. NEWTON
1934 Eighth St., N.W.
Washington, D. C.
Counsel for Appellant

NOTICE OF MOTION

TO:
RUSSELL J. O'MALLEY, Esquire,
Miller Building,
Scranton, Pa.
Of Counsel for Appellees

Please take notice that the undersigned will submit the attached to the United States Court of Appeals for the Third Circuit, sitting in the United States Courthouse, Philadelphia, Pennsylvania, without oral argument, on March 7, 1960, or such time as the court wil lpermit.

JAMES C. NEWTON
Counsel for Appellant

February 26, 1960.

No. 13,115

Present: GOODRICH, STALEY and FORMAN, *Circuit Judges.*

Upon consideration of the motions by appellants in the above cases to ratify and validate the cost bonds filed in the District Court, and to extend time for filing appellants' briefs to April 15, 1960;

It is ORDERED that the motions be, and they are hereby granted.

By the Court,
GOODRICH
Circuit Judge

March 8, 1960

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GOODRICH, MCLAUGHLIN and STALEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:
HARRIET G. HUMPHRYS
Chief Deputy Clerk

September 22, 1960.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,115

ADOLPH HOHENSEE, *Appellant*,

v.

MARILYN FERGUSON, ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

APPELLANT'S DESIGNATION OF RECORD

I

The Clerk of the United States Court of Appeals for the Third Circuit will please prepare a transcript of the record

in this cause for transmission, on petition for writ of certiorari, to the Clerk of the United States Supreme Court and include in said transcript the following items:

1. Judgment entered September 22, 1960.
2. Opinion dated September 22, 1960.
3. Appendix, attached to appellant's brief filed in this cause.
4. This designation of record.

II

The petition for a writ of certiorari is being filed in the United States Supreme Court pursuant to 28 U.S.C., Sec. 1254(1), 62 Stat. 928.

The following question is presented on the petition for writ of certiorari.

Did the Court of Appeals for the Third Circuit err in its affirmance of the Judgment of the United States District Court for the Middle District of Pennsylvania?

JAMES C. NEWTON
Attorney for Appellant
1934 8th St., N.W.
Washington 1, D. C.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,115

ADOLPH HOHENSEE, *Appellant*,

v.

MARILYN FERGUSON, ET AL., *Appellees*.

Pursuand to Rule 36(2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it its hereby stayed until November 6, 1960.

McLAUGHLIN
Circuit Judge

October 17, 1960.

I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original appendix to brief for appellant and proceeding in this court in the case of *Adolph Hohensee* v. *Marilyn Ferguson, et al.*, No. 13,115 on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 14th day of November, 1960.

IDA O. CRESKOFF
Clerk of the U. S. Court of Appeals, Third Circuit.

No. 13,115

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued September 13, 1960
Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges*.

OPINION OF THE COURT
(Filed September 22, 1960)

PER CURIAM

This is an appeal from the judgment of the District Court for the Middle District of Pennsylvania in favor of the defendant. Service on the defendant, American Medical Association, was attempted by serving Dr. Francis P. Boland in Scranton, Pennsylvania. Objection was promptly made that such service did not subject the defendant to jurisdiction, and the trial court properly quashed the service. *Polhemus* v. *American Medical Association*, 145 F.2d 357 (10th Cir. 1944). The remaining defendants were served in the Western District of Pennsylvania although the suit was brought in the Middle District of Pennsylvania. Attack because of improper venue laid was timely made. The district court was correct in finding a want of proper venue and was also correct in refusing in the exercise of its discretion to transfer the case to the Western District of Pennsylvania. See *Hohensee* v. *Akron Beacon Journal Publishing Co., et al.*, 277 F.2d 359 (6th Cir. 1960).

The judgment will be affirmed.

A true Copy:

Teste:

Clerk of the United States Cour of Appeals for the Third Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 751

ADOLPH HOHENSEE, Petitioner

v.

MARILYN FERGUSON, ET AL, Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. S. MOORHEAD, JR.
DAVID W. CRAIG
MOORHEAD & KNOX
Attorneys for Respondents

[illegible] Bldg.
[illegible] 22, Pa.

INDEX

	PAGE
Counter-Statement of Question Presented	1
Counter-Statement of the Case	2
Argument	3
I. Dismissal of the case is well founded upon the ground of wrong venue alone	3
II. Dismissal, rather than transfer, is also justified by the failure of the complaint to state a claim upon which relief can be granted	4
Conclusion	6

TABLE OF CITATIONS

CASES

Hunt v. Crumboch, 325 U.S. 821, 826; 89 L.Ed. 1954, 1957	5
International Refugee Organization v. Bank of America National Trust & Savings Assn., 86 F.Supp. 884, 887	3
Jones v. Radio Corporation of America, 129 F.Supp. 440, 442	3
Klor's v. Broadway - Hale Stores, 359 U.S. 207, 3 L.Ed. 2d 741	5
Pinesich v. Miller, 89 F.Supp. 539	3
Polizzi v. Cowles Magazines, Inc., 345 U. S. 663, 665, 97 L.Ed. 1331, 1334	3
Radiant Burners v. Peoples Gas L. & Coke Company, ... U.S....., 5 L.Ed. 2d 358, 361	4
Skilling v. Funk Aircraft Company, 173 F.Supp. 939, 942	3

STATUTES

15 U.S.C. § 1	4
15 U.S.C. § 15	2, 3
28 U.S.C. § 1406(a)	3, 6

COUNTER-STATEMENT OF QUESTION PRESENTED

Where a federal court has dismissed an antitrust treble damages action on the ground that venue was wrongly laid, should the Court grant certiorari to review such a decision?

COUNTER-STATEMENT OF THE CASE

This action for treble damages, in connection with an alleged antitrust law violation, was instituted under 15 U.S.C. §15 by plaintiff-petitioner Adolph Hohensee in the District Court for the Middle District of Pennsylvania. The complaint stated that petitioner was engaged in interstate commerce and had been injured by a conspiracy of defendants-respondents involving alleged wrongs such as false arrest, abuse of process, libel and slander (5, 6)*.

Respondents Marilyn Ferguson and J. Alex Zehner, employees of the Pittsburgh Sun-Telegraph, a newspaper, were served with process personally in Pittsburgh, in the Western District of Pennsylvania (10, 11, 19).

The two named defendants-respondents, as well as other defendants, filed motions to dismiss the action on the ground that venue had been laid in the wrong district, supported by affidavits establishing that respondents resided in the Western District of Pennsylvania and had no agent in the Middle District of that state (9-11). Moreover, petitioner's complaint, in the fourth paragraph (5), alleged that respondents Marilyn Ferguson and J. Alex Zehner were engaged in business in Allegheny County, Pennsylvania, which is in the Western District.

* Numbers refer to pages of the Petition for Writ of Certiorari.

ARGUMENT

I.

Dismissal of the case is well founded upon the ground of wrong venue alone.

Both the district court and the court of appeals properly concluded that venue had been incorrectly laid in the Middle District of Pennsylvania, because 15 U.S.C. §15 clearly requires that venue be laid where the defendant resides, is found, or has an agent, and the record establishes that defendants' situation does not meet any of those criteria.

Under 28 U.S.C. §1406(a), if venue is wrong, the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Thus dismissal of the case is clearly justified by statute if a timely objection to venue is interposed. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665, 97 L. Ed. 1331, 1334 (1952).

In administering the statute, the district courts have uniformly held that, in case of wrong venue, dismissal is mandatory unless it is affirmatively shown that transfer is necessary to avoid injustice. *Skilling v. Funk Aircraft Company*, 173 F. Supp. 939, 942 (1959). The lower court has discretion to determine that the interests of justice would warrant transfer, but where, as here, there is no showing of fair necessity for transfer, the action is to be dismissed. *International Refugee Organization v. Bank of America National Trust & Savings Assn.*, 86 F. Supp. 884, 887 (1949); *Pinesich v. Miller*, 89 F. Supp. 539 (1950); *Jones v. Radio Corporation of America*, 129 F. Supp. 440, 442 (1955).

Thus the result in the instant case can rest entirely upon the properly-exercised discretion of the district court, as the court of appeals has stated (29).

II.

Dismissal, rather than transfer, is also justified by the failure of the complaint to state a claim upon which relief can be granted.

Justification of the decision need not depend upon the district court's additional point that the complaint failed to state a cause of action upon which relief could be granted (21).

Nevertheless, the propriety of dismissal of the action, instead of a transfer of it, is further underscored by petitioner's failure to state a cause of action.

According to a very recent decision of this Court, statement of a claim upon which relief can be granted under Section 1 of the Sherman Act (15 U.S.C. §1) requires "allegations adequate to show [1] a violation and [2], in a private treble damage action, that plaintiff was damaged thereby . . ." *Radiant Burners v. Peoples Gas L. & Coke Company,* .... U.S. ...., 5 L. Ed. 2d 358, 361 (1961).

The present complaint, aside from the bald averment that there was a "conspiracy in restraint of trade and commerce", merely avers certain injuries purely personal to petitioner, in the nature of false arrest, libel, slander and the like (6). The complaint thus avers a combination or conspiracy in restraint of petitioner personally but not in restraint of trade.

Argument.

There are no "allegations adequate to show a violation" of the Sherman Act's prohibition against restraints of trade or commerce. Despite the averment of injury to petitioner, the complaint fails to suggest that such injury stemmed from any trade restraint. In other words, the complaint not only falls short of describing an unreasonable restraint of interstate commerce in general, but also fails to point out any damage to petitioner's particular segment of that commerce. Contrast: *Klor's v. Broadway-Hale Stores,* 359 U.S. 207, 3 L. Ed. 2d 741 (1959).

Petitioner's sole theory appears to be that he has a remedy under the antitrust laws for any personal wrong done to him, merely because he claims to be engaged in interstate commerce. However, this Court has clearly pointed out that the antitrust laws do not purport to afford remedies for all torts committed against persons engaged in interstate commerce: *Hunt v. Crumboch,* 325 U.S. 821, 826, 89 L. Ed. 1954, 1957 (1945).

CONCLUSION

Nevertheless, whether or not a cause of action has been well pleaded, the dismissal of the action is supported by the procedural statute alone: 28 U.S.C. § 1406(a).

Allowance of certiorari in this case would be inappropriate because only a simple matter of venue is involved.

Respectfully submitted,

W. S. MOORHEAD, JR.
DAVID W. CRAIG
MOORHEAD & KNOX
Attorneys for Respondents
MARILYN FERGUSON and J. ALEX ZEHNER